

No. 1-11-0230

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 7631
)	
RICHARD ISMAR,)	The Honorable
)	Matthew Coghlan,
Defendants-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Sterba concurred in the judgment.

ORDER

¶ 1 *Held:* The State did not violate defendant's federal and state due process rights to a fair trial where any perceived error is harmless beyond a reasonable doubt, furthermore, the denial of defendant's motion to quash the search warrant and suppress evidence is affirmed where the defendant has failed to preserve the issue and the presumed error does not constitute plain error.

¶ 2 Richard Ismar was charged by indictment with possession of a controlled substance following a sting operation by the Chicago Police Department in which they intercepted and delivered a package containing approximately 2,000 pills of methylenedioxymethamphetamine (a.k.a. MDMA) to defendant. Following a jury trial, defendant was convicted and sentenced to a

No. 1-11-0230

term of fifteen years in the Illinois Department of Corrections.

¶ 3 Prior to trial, defendant filed a motion to suppress evidence and quash search warrant, asking the court to quash defendant's arrest and suppress evidence seized. The motions alleged that the "stop," search and seizure of the Federal Express (Fed Ex) package was unlawful. On February 18, 2010, a hearing on the motion was held. Jeffrey Show, a Chicago Police Officer assigned to the Organized Crime Division, Narcotics Sections, Package Interdiction Team, testified. Officer Show, as a member of the package interdiction team, reports to shipping facilities to intercept narcotic latent packages that have been shipped into Illinois.

¶ 4 Officer Show testified that on March 21, 2008, he was stationed at the Fed Ex facility in Skokie, Illinois, investigating suspicious packages. A particular package aroused Officer Show's suspicion due to its handwritten label and the fact that the package was shipped from California. These factors piqued the Officer's interest due to the fact that the majority of labels on packages are computer-generated and narcotics are often shipped from states that share a border with Mexico a.k.a. "source states." The package was addressed to "Rich Igmarr, 4962 N. Milwaukee, Chicago, Il 60630," and was returnable to "Lori Schaeffer, 4601 Goodland Ave., Valley Village, CA 91607."

¶ 5 Officer Show, following common practices and procedures, ran a search on the account number that was handwritten on the label of the package in order to determine whether "Lori Schaeffer," the sender as written on the package, was the individual registered to use that account number. The results of the inquiry proved that the owner of this account number was a corporation, Mailbox International in Tarzana, California, not Lori Schaeffer. Show testified that

No. 1-11-0230

it was not unusual for packages containing narcotics to use stolen account numbers.

¶ 6 Officer Show's narrative of the above stated events was contradicted by an affidavit made by a member of the Fed Ex Legal Department, which was stipulated to by both parties. The affidavit stated in pertinent part that, "one must make an electronic inquiry into Federal Express account records to determine whether or not the account is fictitious. It is a general, non-written, policy of FedEx that a third-party submit a valid subpoena for access to FedEx account records." Officer Show testified that Fed Ex employees have never asked him for a subpoena prior to running a search on an account number.

¶ 7 Nevertheless, the package was taken from the Fed Ex facility in Skokie to a Chicago Police facility in Homan Square. Approximately one and a half hours after discovering the suspicious package, Officer Show placed the package into a parcel lineup, which places anywhere from 6 to 12 packages, similar in size, next to a suspicious package. A Chicago Police dog, "Harry," then sniffed each package, eventually alerting to the package in question, indicating that the package did, in fact, contain narcotics.

¶ 8 Officer Show then prepared a complaint for an opening search warrant, which is used to gain permission to open suspicious packages. Officer Show's warrant included information which he deemed significant in order for a judge to make a ruling on probable cause – the package having a handwritten label, being shipped from a source state and containing a fictitious account number. The judge granted Show's opening warrant. Show then returned to the police station, opened the package and removed the contents. Upon opening the package, Show discovered a black nylon case; inside the case were three clear plastic bags, which cumulatively

No. 1-11-0230

contained approximately 1,900 blue pills. Following a field test, it was confirmed that the blue pills were MDMA.

¶ 9 Officer Show admitted, however, that the opening search warrant he prepared contained a typographical error regarding the Fed Ex account number. He mistakenly added an extra zero. Show maintained that despite the typographical error on the opening search warrant, the correct number was given to the Fed Ex employee who conducted the initial search which determined that Lori Schaeffer was not the name registered to the account. Show further acknowledged that he should have indicated that the number was a false account number for Lori Schaeffer rather than describing it as factitious.

¶ 10 Following arguments on the motion, the lower court found that Officer Show had a reasonable articulable suspicion that justified his removing the package from the stream of mail, conducting a computer search on the account number and conducting the canine sniff. The court, citing *People v. Shapiro*, 177 Ill. 2d 519 (917), stated there are numerous factors that a court considers when determining whether the removal of a package from the stream of mail was justified, any one factor being sufficient. In this case, the court held that three factors were present: the package had a handwritten label; it was an express overnight package; and based on the officer's experience, he believed the package to be suspicious. The lower court discounted the fact that the account number was in fact not factitious, asserting that it was merely one of many factors. Furthermore, the lower court found that the length of the detention of the package to be reasonable. Finally, the lower court held that once the dog sniff occurred, signaling that the package contained narcotics, there was probable cause for the issuance of the search warrant.

No. 1-11-0230

Thus, the court denied the motion to quash the search warrant and suppress evidence.

¶ 11 At trial, Officer Show testified that immediately following the field test determining that the blue pills were MDMA, an electronic investigation was conducted to determine if there was an individual by the name listed on the package "Rich Igmarr" at the listed address, 4962 Milwaukee Ave Chicago, IL 60630. The investigation revealed that a Richard *Ismar* lived at 4962 N. Milwaukee in apartment C. Due to a lack of manpower on a Friday, the next step in the investigation, the controlled delivery, would be delayed until the next scheduled workday for the officers, Monday.

¶ 12 On Monday, Officer Show prepared a delivery search warrant which allowed the officers to deliver the package containing the narcotics to defendant. Prior to the delivery, the package was wired with an electronic monitoring device. This device consists of fine hair-like filaments which are concealed throughout the package. When the package is opened, those filaments trigger and send an electronic signal to the police. Following a test of the electronic device to ensure it was functioning correctly, Chicago Police Officer Lymperis, donned the attire of a FedEx employee, loaded the package into a FedEx vehicle and drove to 4962 N. Milwaukee. Upon arrival, Officer Lymperis exited the vehicle with the package and approached the common front door to the multi-unit building. When no one answered the door, Officer Lymperis left a FedEx door hanger in the jam of the common door, informing the tenants of the building that a package was attempting to be delivered. The hanger tag included the date and Officer Show's cellular telephone number, it did not include defendant's name or apartment number.

¶ 13 Approximately three hours later, Officer Show received a telephone call from an

No. 1-11-0230

individual identifying himself as Richard Ismar of 4962 N. Milwaukee. Defendant inquired as to whether he was speaking with Fed Ex, stated that earlier they had tried to deliver a package to him and asked if the package could be redelivered. Officer Show responded that the package could be redelivered in approximately 10 minutes. Officer Show then contacted his supervisor. Shortly thereafter, Show observed Officer Lymperis return to 4962 N. Milwaukee, exit his vehicle and approach the front door of the house.

¶ 14 Officer Lymperis testified that as he approached the condominium building at 4962 N. Milwaukee, defendant was waiting inside the glass common door to the building. Defendant opened the door, and Officer Lymperis stated that he had a package for a "Rich Igmarr." Defendant corrected the officer, stating that his last name was "Ismar." At this point Officer Lymperis handed defendant a Fed Ex signature log, which defendant signed. Officer Lymperis then handed defendant the package and left.

¶ 15 Approximately four minutes later, the electronic signaling device planted inside the package was activated and a signal was sent alerting the officers that the package had been opened. Upon receiving this alert, Officer Show, along with his colleagues on the package interdiction team, entered defendant's apartment with a search warrant.

¶ 16 At trial, during its case-in-chief, the State asked Officer Show a series of questions regarding the officer's interactions with defendant immediately following the execution of the search warrant. The following colloquy occurred:

[State] Q: Did you have any interaction with the defendant at that time?

[Officer Show] A: Briefly

[State] Q: What would that be?

[Officer Show] A: I asked him if he wanted to cooperate with this investigation.

No. 1-11-0230

[State] Q: What did he say

[Officer Show] A: He said no.

Defendant made an immediate objection and requested a sidebar. The court sustained the objection, struck the answer from the record and instructed the jury to disregard the last question and answer. During the next court recess, while Officer Show was still testifying, defendant moved for a mistrial, arguing that Officer Show's comments could lead the jury to have an inference that defendant was trying to hide something. The State responded, arguing that the question asked had nothing to do with a potential conversation the officer had with defendant, or about defendant not wanting to cooperate, but was only an inquiry to establish a time line of events showing whether the officer had any further interaction with defendant. The court, after reviewing the transcript, probed the State as to what information it was seeking when asking that line of questioning. The State claimed it was anticipating Officer Show to testify that there was no further interaction between him and defendant. Defendant's motion for a mistrial was denied. The court elaborating on its decision stated that the objection was sustained immediately, the jury was instructed to disregard all of the previous comments and the answer was stricken from the record.

¶ 17 Following the State's case-in-chief, the defense rested without presenting any evidence. Both parties presented closing arguments after which the jury found defendant guilty of possession of a controlled substance with the intent to deliver. Following a sentencing hearing, defendant was sentenced to 15 years in the Illinois Department of Corrections.

¶ 18 Defendant timely appeals, contending that the lower court erred in denying its motion to quash the search warrant and suppress evidence, and that the State violated defendant's federal

and state due process rights to a fair trial.

¶ 19 Analysis

¶ 20 Defendant contends that his federal and state due process rights to a fair trial were violated when the State referred to his failure to cooperate with the investigation as substantive evidence of his guilt. Defendant maintains that Officers Show's comments were solicited purposely and gratuitously, for no other reason than to tell the jury that defendant had something to hide, and in doing so, denied defendant a fair trial as guaranteed under the 5th and 14th amendments of the United States Constitution. This issue is a legal one which is reviewed *de novo*.

¶ 21 As a primary matter, defendant argues that plain error analysis is applicable. The State, however, concedes that this argument has been properly preserved . Thus, this argument is not subject to the plain error rule. See *People v. Herron*, 215 Ill. 2d 167, 178 (2005). The plain error doctrine is a limited exception which allows the appellate court to review *forfeited* errors affecting substantial rights. (emphasis added).

¶ 22 In *Doyle v. Ohio*, 426 U.S. 610, 618 (1976) the Supreme Court held it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used against him. The State contends, however, that it is unclear from the record whether defendant's comments were made after he was arrested or when he was subject to a custodial interrogation. Knowing this, it is unclear whether defendant was read his *Miranda* rights, thus making it impossible to have a *Doyle* violation. Defendant, however, refers us to *People v. Young*, 201 Ill. App. 3d 521, 525 (1990), where this court held that "[a]n individual's fifth

amendment rights exist exclusive of the right to receive *Miranda* warnings. Therefore, we do not view custodial interrogation as an indispensable requisite for the invocation of those rights."

Further, *People v. Spivey*, 209 Ill. App. 3d 584, 591(1991), held that a request to remain silent prior to an arrest or custodial interrogation are sufficient to trigger *Miranda* rights. Thus, we will review defendant's claim of whether the above mentioned comments constituted a *Doyle* violation.

¶ 23 It is well established that a *Doyle* violation is subject to harmless error. *People v. Miller*, 96 Ill. 2d 385, 395 (1983). In determining whether the error was in fact harmless, "the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967) citing *Fahy v. State of Connecticut*, 375 U.S. 86-87 (1963). A constitutional due process error can only be deemed harmless if it is proven beyond a reasonable doubt that the alleged error did not contribute to the defendant's conviction. *People v. Dean*, 175 Ill. 2d 244, 259 (1997). The Illinois Supreme Court in *People v. Hart*, Ill. 2d 490, 517-18 (2005), recognized five factors to consider in determining whether a *Doyle* violation is harmless beyond a reasonable doubt: (1) the party who elicited the testimony about defendant's silence; (2) the intensity and frequency of the references to the defendant's silence; (3) the use that the prosecution made of defendant's silence; (4) the trial court's opportunity to grant a mistrial motion or to give a curative jury instruction; and (5) the quantum of other evidence proving the defendant's guilt. Defendant fails to cite or acknowledge the factors laid out in *Hart*, instead, it merely asserts that the State used Officer Show's testimony as evidence of defendant's guilt while arguing that the evidence is far from

No. 1-11-0230

overwhelming.

¶ 24 The State concedes that they did in fact elicit the testimony in question, therefore, satisfying one prong of the *Hart* analysis, but contend it is the only factor that favors defendant's argument that a due process error occurred. We agree. As far as the intensity and frequency of the references to defendant's silence, it is clear from the record that following defendant's objection to the line of questioning, the State failed to re-raise the issue or mention it throughout the remainder of the case. Next, we find defendant's contention that the State solicited this testimony merely for the purpose of showing the jury that defendant had something to hide is tenuous at best. In fact, the State never makes use of Officer Show's testimony throughout the remainder of the trial. Next, the trial court was given an opportunity to grant a mistrial, in fact, defendant made a motion for a mistrial which the court denied. Finally, there was overwhelming evidence of defendant's guilt.

¶ 25 Regarding the evidence of guilt, defendant maintains that the primary issue is whether he had knowledge of the contents of the expected package. Defendant argues that the evidence can not possibly be overwhelming, because the State failed to present any direct evidence that he was expecting a package, communicated with the sender of the package, Lori Schaeffer or with FedEx, or any indicia of drug dealing in his home.

¶ 26 The element of knowledge that a package contained narcotics is rarely susceptible to direct proof, but may be proved by evidence of acts, declarations or conduct of the accused from which an inference of knowledge may be inferred. *People v. Peyton*, 25 Ill 2d 392, 395 (1962). As stated above, the hanger tag left at the common door of 4962 N. Milwaukee, a multi-unit

No. 1-11-0230

building, did not include defendant's name, apartment number or any indication that the package was for him. Defendant, however, retrieved the hanger tag, immediately telephoned the number left on the tag and stated that Fed Ex had attempted to deliver a package to *him* and asked whether the package could be re-delivered that day. Twenty minutes later, when the package was delivered, defendant was waiting in the hallway of the main door to the condo building and proceeded to open the package within five minutes of delivery. Furthermore, defendant was alone in his apartment when the police entered with the search warrant. Finally, the overwhelming quantity of pills shows his intent to deliver. Thus, a strong inference can be made that defendant was, in fact, expecting a package and had knowledge that it contained narcotics. For the above mentioned reasons, we find that the evidence in this case is overwhelming and beyond a reasonable doubt. We find that, even without Officer Show's comment, the jury would have still found defendant guilty.

¶ 27 Finally, while the State concedes and we agree that one of the *Hart* factors was met, the State eliciting the testimony in question, numerous cases have held a single *Hart* factor alone to be harmless beyond a reasonable doubt. See *People v. Miller*, 96 Ill. 2d 385, 396 (1983); *People v. Dameron*, 196 Ill. 2d 156, 166 (2001). In particular, we find *People v. Paterson*, 154 Ill. 2d 414 (1992), to be most analogous and thus instructive on the issue. In *Paterson*, the defendant claimed that the State violated his due process rights as espoused in *Doyle* when it commented on his post-arrest silence. On direct-examination the following colloquy occurred regarding the accused's willingness to answer questions following his arrest:

"Witness (Police Officer): Yeah. Do you wish to answer questions, at this time?
Prosecutor: What was his reply?"

Witness (Police Officer): No." *Id.* at 465

At this point, the defendant immediately moved for a mistrial. *Id.* A sidebar ensued, the State claimed that he expected the witness to testify that defendant had indicated that he would be willing to answer questions later. *Id.* The court reserved its ruling and allowed the questioning to continue. *Id.* After further probing by the prosecutor regarding comments made following the defendant's arrest, the defendant renewed his objection. *Id.* at 466 At this point, the court called a conference in chambers to ascertain the reasoning behind the State's questioning. *Id.* The State responded that it was surprised by the witness' response and was trying to convey that the witness and the defendant did not discuss the case, that the witness merely transported the defendant. *Id.*

At this point, the court denied the motion for mistrial finding the error harmless and curable by jury instruction. *Id.* The court then proceeded to instruct the jury to disregard the objectionable examination. *Id.* Throughout the remainder of the trial, no further mention of defendant's post-arrest silence occurred. The court found the error harmless beyond a reasonable doubt. *Id.* at 468. The court relied on the fact that the brief commentary on the defendant's post arrest silence was not as egregious as in other cases where *Doyle* violations have been found, that the curative instructions were clear, that the State never relied on the post-arrest silence as evidence and finally that the admissible evidence was sufficient to prove defendant's guilt beyond a reasonable doubt. *Id.* at 467.

¶ 28 The facts in the case *sub judice* are nearly identical. As stated above, a conversation took place between Officer Show and defendant immediately following the officers entering defendant's apartment in execution of the search warrant, but prior to the reading of Miranda rights. On direct examination, the State elicited testimony regarding defendant's oral denial of

No. 1-11-0230

Officer Show's request to cooperate with the investigation. Defendant immediately objected and a sidebar ensued, after which Officer Show's answer was stricken and the judge instructed the jury to disregard the previous question and answer. At the next recess, defendant moved for a mistrial, citing the testimony of Officer Show. The State claimed that it was surprised by Officer Show's response and it was anticipating an answer that there was no interaction at that time in order to prove that Officer Show did not have any further interaction with defendant. At this point, the court denied for the motion for mistrial, stating that the jury was instructed to disregard, the answer was stricken from the record and finally, instructing that no further reference to would occur from that point forward. Thus, based on the reasoning in *Paterson*, we find the alleged error in the lower court to be harmless beyond a reasonable doubt.

¶ 29 Defendant next contends that the trial court's decision to deny his motion to quash search warrant and suppress evidence was manifestly erroneous where the record indicated that at the time a police officer seized the express package addressed to defendant, the only factors present were that it had a handwritten label and was mailed from California. The State astutely points out that defendant failed to include this issue in its post-trial motion and defendant has failed to file a reply brief to respond. We note, that defendant misguidedly argued plain error for the previous issue when it was not applicable and failed to argue plain error in this circumstance, where it is applicable. Nevertheless, we will give defendant the benefit of the doubt and conduct plain error analysis.

¶ 30 In order to properly preserve an issue on appeal, a movant must object to the purported error at trial and include it in its written post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186

(1988). Defendant failed to include this issue in his post-trial motion thus forfeiting the issue. Nevertheless, pursuant to the plain error doctrine, we may review unpreserved error where (1) the evidence in the case was so closely balanced that the error alone threatened to tip the scales of justice or (2) the error is so serious that it denied the defendant a fair trial and challenged the integrity of the judicial process, regardless of the closeness. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2001). Before considering defendant's claims under the plain error doctrine, an initial determination must be made as to whether error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 31 Assuming *arguendo*, and for the sake of brevity, if an error occurred, plain error still requires a finding that the evidence was closely balanced or the error is so serious that it denied defendant a fair trial. As stated above, the evidence was not closely balanced. Thus, a determination need only be made to whether the error was of such a magnitude that defendant was denied a fair and impartial trial, and remedying the error is necessary to preserve the integrity of the judicial process. *People v. Nielson*, 187 Ill. 2d 271, 297 (1999).

¶ 32 The Supreme Court in *People v. Glasper*, 234 Ill. 2d 173, 197 (2009), equated second prong plain error review with structural error. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). "Structural errors have been recognized in only a limited class of cases including: a complete denial of counsel; trial before a biased judge; racial discrimination in the selection of a grand jury; denial of self-representation at trial; denial of a public trial; and a defective reasonable doubt instruction." *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 78. An error regarding denying a motion to suppress has not been recognized as a structural error, nor does it fall into

No. 1-11-0230

the framework of errors which corrupt the integrity of the trial. Thus, defendant's alleged error fails under both prongs of the plain error rule.

¶ 33 Accordingly, we affirm the trial court's judgment

¶ 34 Affirmed.